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SUPREME COURT, U.S.

No. 508.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

UNITED STATES OF AMERICA,
Petitioner,

v.

INTERNATIONAL BUILDING COMPANY, a Corporation.

**RESPONDENT'S BRIEF AGAINST ISSUANCE OF
WRIT OF CERTIORARI.**

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Respondent, taxpayer, prays that the issuance of a writ of certiorari be denied.

OPINIONS BELOW.

The opinion of the District Court (R. 178) is reported at 97 F. Supp. 595. The opinion of the Court of Appeals for the 8th Circuit appears at page (R. 206) and is reported at 199 Fed. 2d 12.

JURISDICTION.

The jurisdiction of this court is admitted.

QUESTION PRESENTED BY PETITION FOR CERTIORARI.

The Commissioner of Internal Revenue assessed deficiencies against taxpayer for the taxable years 1933, 1938 and 1939 by determining that the taxpayer's basis for depreciation on its building was not \$860,000.00 as set out in its tax returns but was \$385,000.00. The respondent taxpayer filed two petitions for redetermination by the Tax Court of these deficiencies alleging as the only issue in the case that its basis for depreciation was \$860,000.00 and that it owed no tax by reason thereof. Thereafter stipulations were filed in the Tax Court executed by taxpayer and Commissioner that there were no deficiencies for the years in question. No trial was had. Pursuant to the stipulation the Tax Court entered two decisions that there were no deficiencies in income tax for the calendar years in question. Thereafter for years 1943, 1944, and 1945, the Commissioner again assessed deficiencies determining that the taxpayer's basis for depreciation was \$430,000.00 instead of the \$860,000.00 upon which the taxpayer was still taking depreciation. The deficiencies were paid and suit for refund followed. The taxpayer making the same identical allegations as to basis for depreciation as in the prior suits before the Tax Court. The District Court held against respondent. On appeal the Court of Appeals sustained respondent taxpayer's contention that the decision of the Tax Court was res adjudicata, that the government was estopped from asserting a different basis.

The question presented on petitioner's application for certiorari is, (1) whether or not the decision is in conflict with the decision of the Court of Appeals for the 10th Circuit and (2) whether or not the following issue is suffi-

ciently important for this Court to again pass upon; as to whether a consent judgment entered by the Tax Court pursuant to stipulation without a hearing in a cause where there is only one single issue for determination, is res adjudicata on the same identical issue by the same parties, in a subsequent proceeding.

STATEMENT.

The statement in petitioner's petition for writ of certiorari states fairly well the salient facts involved; except that we disagree with petitioner's statement that the Court of Appeals recognized its holding to be in conflict with **Trapp v. United States**, 177 F. 2d 1 (10th Circuit), certiorari denied, 339 U. S. 913, in that the Court analyzed the distinction between the Trapp case and the instant case. The stipulation in Trapp case was a compromise agreement of the parties, where in the instant case, there was no compromise agreement.

In the Record, page 31, "Stipulation and agreement as to certain facts" between taxpayer and Commissioner, on page 45 of the Record it was stipulated that the allegations of the petitioner in its petitions to the Tax Court for the years 1933, 1938 and 1939 as to the \$860,000.00 basis for depreciation, is the same identical issue for determination in the instant case. Respondent taxpayer contends that the opinion of the Court of Appeals below is not in conflict with **Trapp v. United States**, supra, and that this Court has previously passed upon and held that consent judgments are res adjudicata when the same identical issue is before the Court in a subsequent proceeding between the same parties. Respondent taxpayer further contends that the decision of the Court of Appeals is in complete harmony with and follows **Commissioner of Internal Revenue v. Sunnen**, 333 U. S. 591, and the still more recent decision of **United States v. Munsingwear**, 340 U. S. 36.

REASONS FOR DENYING THE ISSUANCE OF WRIT.

There was only one single issue presented to the Tax Court in taxpayer's two petitions for redetermination for the years 1933, 1938, and 1939. That sole single issue was the basis for depreciation. By stipulations the Commissioner and taxpayer stipulated that there were no taxes due for the years in question and the Tax Court entered its judgment on the lone single issue before it that there were no deficiencies for the years involved. In *Trapp v. United States*, 177 Fed. 2d 1 (10th), certiorari denied, 239 U. S. 913, page 5 of the Reporter, it appears that, after an appeal to the Board of Tax Appeals, it was stipulated as to the amount of tax deficiency and the Board of Tax Appeals entered a decision for the agreed amount, and the Court in that case said that it was merely to carry out a compromise agreement, and, therefore, the previous judgment was not res adjudicata and did not support a plea of estoppel in a suit for refund. Naturally there could be no estoppel in a case such as the Trapp case because there was a compromise agreement as to the amount of taxes and did not decide any issue in the case. It was not a consent judgment by confession of stipulation on the only issue in the case such as in the instant case.

In the same 10th circuit, that Court in a subsequent decision again recognized what was and what was not res adjudicata, in the case of *Martin v. Brodrick*, 177 Fed. 2 886, 887, 888, citing the Trapp case and the Sunnen case (p. 887), and by further holding (p. 888) that a mistaken notion of the law did not obviate the conclusive effect of the first judgment since the second claim was nevertheless capable of being completely determined in the first suit, citing *Guettel v. United States* (8th circuit), 95 Fed. 2 229, certiorari denied 305 U. S. 603, and then held that the question presented was a new one not present in the first case.

This ruling, subsequent to its decision in the Trapp case, clearly shows that there is no conflict between Trapp case and the instant case, and that it follows the rule laid down in the Sunnen case.

Nor is the decision of the Court of Appeals below in conflict with **Hartford-Empire Co. v. Commissioner**, 137 F. 2d 540 (2nd Circuit). In that case a stipulation was filed agreeing to a certain amount of deficiency (page 541 of reporter) and the Tax Court entered a judgment accordingly pursuant to stipulation. The Court of Appeals said at top of page 542 that the cost which is the basis for depreciation was not an issue in the earlier proceeding. That is not the situation in the instant case where there was a stipulation by confession that there were no taxes due on the only issue in the case, and judgment was entered thereon by confession of judgment. These two cases were carefully analyzed in the opinion of the Court below. In the Trapp case, on page 218 of the Record, and the Hartford-Empire case, on page 220 of the Record, the Court very carefully showed the distinction between the facts in those cases and the one in the instant case by quoting that the Trapp case was a compromise agreement as to taxes and in the Hartford-Empire case by showing that the issue presented in the second case was not determined in the former case.

There is a wide distinction between compromise stipulations and judgments entered thereon and consent judgments entered in a case where there is only one single issue for determination. In the compromise cases nothing is determined. A compromise is a settlement by mutual concessions. In a judgment by confession by consent, as in the instant case, there were no mutual concessions, the only concession being made by the Commissioner that there were no taxes due; and hence reason and logic dictate that the only issue in the case was determined by the

judgment. In the stipulation in the instant case, the Commissioner admitted that the \$860,000.00 basis for depreciation was correct because if it had been any less there would have been some taxes due.

The opinion in the Court below is in entire accord and harmony with the principles stated by this Court in **Commissioner v. Sunnen**, 333 U. S. 591, 597, 598, in the following language:

“*Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding*” (Emphasis ours.)

The point at issue in the Tax Court was a basis for depreciation and the identical point is at issue in the present case; and, therefore, this case is in entire harmony with the Sunnen case, and the decision of this Court therein, and as this Court said in the Sunnen case, the estoppel operates to relieve the government and the taxpayer of redundant litigation of the identical question of the statute’s application to the taxpayer’s status. And the decision below further is in harmony with the Sunnen decision, quoting from 333 U. S. 591, c. 598:

“*The judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. **Cromwell v. County of Sac**, supra, 94 U. S. 351, 353.*” (Emphasis ours.)

Petitioner states in its reasons for granting the writ of certiorari that the above quoted principle has been followed by the Tax Court in its decisions, and citing **Volunteer State Life Insurance Co. v. Commissioner**, 35 B. T. A.

491, **Riter v. Commissioner**, 3 T. C. 301, in support. Respondent disagrees with that statement of petitioner and an analysis of the quoted cases will not bear out petitioner's statement or reason.

In **Volunteer State Life Insurance Co. v. Commissioner**, 35 B. T. A. 491, the Board of Tax Appeals decided that petitioner had overpaid his income taxes for 1928 in the amount of \$2,719.94 on the basis of certain issues presented to them. Thereafter on appeal in the Court of Appeals pursuant to a stipulation, the judgment of the Board of Tax Appeals was reversed, and thereafter pursuant to compromise stipulation of the parties to that effect, the Board entered its decision that petitioner had overpaid its income tax for 1928 in the amount of \$1,535.08. The judgment in that case was a compromise judgment and the Tax Court properly said at page 496:

"Therefore the questions in docket 54176 are different from those involved in the present proceeding and *res adjudicata* has no application."

In **Riter v. Commissioner**, 3 T. C. 301, during the year 1936 four gifts were made and a tax of \$654.07 was paid on the ground that two of the exclusions claimed were gifts of future interest. The Commissioner assessed deficiencies and an appeal was made to the Tax Court. By compromise stipulation filed in that Court, it was agreed that the Tax Court might enter a judgment for overpayment in the amount of \$190.76 and the Tax Court entered a judgment accordingly. In the year 1937 additional gifts were made and again the Commissioner assessed deficiencies. The plea of *res adjudicata* was set up by the taxpayer. The Court properly held it to be an entirely different cause of action (page 305); and the judgment was not *res adjudicata*. The Tax Court properly held *res*, because it was a compromise judgment. All of the Tax

Court cases cited in support of petitioner's statement above are gift tax cases and in none of the Tax Court decisions cited by petitioner did the judgment in the subsequent case disallow any gift exclusion that had been obtained in prior years or did the Tax Court reduce the exemptions that had previously been allowed in the earlier cases. These very facts show that the Tax Court recognized the distinction between compromise judgments and judgments by confession where there is only one single issue in the case and thereby followed the ruling in the Sunnen case, *supra*.

With the distinction in mind between compromise settlements and judgments entered thereon and judgments by confession where there is only one single issue in a cause, we quote the following decisions decided by this Court on the effect of consent judgments.

In **Thompson v. Maxwell**, 95 U. S. 391, 398, this Court said:

"A decree for carrying out a settlement and compromise of a suit is certainly not of itself erroneous. When made by consent it is presumed to be made in view of the existing facts and that these were in the knowledge of the parties. In the absence of fraud in obtaining it, such a decree cannot be impeached."

In **Harding v. Harding**, 198 U. S. 317, 335, this Court said:

"Decrees so entered by consent, cannot be reversed, set aside or impeached *** except for fraud, unless it be shown that the consent was not in fact, given, or something was inserted as by consent that was not consented to."

See also **McGowan v. Parish**, 237 U. S. 285, 295, and **Russell v. Place**, 94 U. S. 606, 608.

In **United States v. Munsingwear**, 340 U. S. 36, the United States filed a complaint in two counts for price violation: (1) for an injunction and (2) for treble damages. By agreement of the parties the second count was held in abeyance pending trial and final determination of the first count. The District Court dismissed the first count holding that the defendant's prices complied with price regulations. The United States took an appeal and, while the appeal was pending, the commodity involved was decontrolled and the Court of Appeals dismissed the appeal because the question was moot. The United States acquiesced in this dismissal and did not seek to vacate the judgment below. The District Court thereafter dismissed the action on the ground that the matter was res adjudicata. Upon certiorari, this Court sustained the District Court's dismissal citing in support **Southern Pacific v. United States**, 168 U. S. 1, 48-49; **Cromwell v. County of Sac**, 94 U. S. 351, 352; **Commissioner v. Sunnen**, 333 U. S. 591, 597, 598. This Court thereupon recognized the effect of a consent judgment by the United States and upheld the plea of res adjudicata.

In the Munsingwear case, the Court said:

“If there was hardship it was preventable * * * in this case the United States made no motion to vacate the judgment. It acquiesced in the dismissal.”

Petitioner in this case complains of the hardship that might be suffered by the Bureau of Internal Revenue. If there is a hardship it was caused by the Commissioner not availing himself of the remedies to which he was entitled in order to preserve his rights. He had an opportunity to put in the stipulation filed with the Tax Court that the determination of the Tax Court should not be held to be a decision fixing the basis for depreciation but he failed to do that and now seeks the aid of this Court to help him in what he calls a case of hardship for the Bureau of

Internal Revenue. If the Bureau of Internal Revenue uses "laconic forms of stipulations" (page 11, petitioner's petition), then it is the fault of those who are in charge of the litigation for the bureau and certainly forms no basis to seek the aid of this Court nor does a mistaken notion of the law obviate the effect of the first judgment. *Guettel v. United States*, 95 Fed. 2d 229, cert. denied 205 U. S. 603.

The petitioner seeks to avoid the rules of law laid down over a long period of years by this Court, beginning with **Cromwell v. County of Sac**, *supra*, through **Tast v. Western Maryland Railway Co.**, 289 U. S. 620, and the **Sunnen** case, *supra*, as well as the **Munsingwear** case, *supra*. This Court has already passed upon and definitely defined what is and what is not *res adjudicata*, and what narrow limits must be observed as to collateral estoppel. And these narrow limits were followed in the opinion of the Court of Appeals.

Petitioner on page 12 of its petition refers to Section 1117 (d), Internal Revenue Code, 26 U. S. C. 1117 (d), which merely states that where a petition for redetermination of a deficiency has been filed by a taxpayer that the decision of Tax Court dismissing the proceeding is considered as a decision that the deficiency is the amount determined by the Commissioner. Petitioner argues that in light of this provision, a consent judgment of the sort entered in the instant case does not amount to an adjudication of any issue. But this was not a dismissal and there is no proof that it was. Petitioner seeks, in effect, for this Court to say when is a judgment not a judgment.

CONCLUSION.

We respectfully submit in view of the decisions of this Court that we have cited above that there is no conflict between decisions of Courts of Appeal that the question

presented is not a new question but has been passed upon many times as noted above, and therefore the petition for issuance of writ of certiorari should be denied.

Respectfully submitted,

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